[Cite as *Cobb v. Shipman*, 2015-Ohio-2604.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DEBRA R. COBB, INDIVIDUALLY AND AS PARENT AND LEGAL GUARDIAN OF H.N.C., A MINOR, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees,	:	**CASE NO. 2013-T-0117**
- vs -	:	
TARA SHIPMAN, M.D., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2006 CV 2992.

Judgment: Affirmed.

Martin F. White, Martin F. White Co., L.P.A., 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482; *Norman A. Moses,* 100 Marwood Circle, Boardman, OH 44512; and *Michael M. Djordjevic,* Djordjevic, Casey & Marmarus, 17 S. Main St., Suite 201, Akron, OH 44308 (For Plaintiffs-Appellees).

Douglas G. Leak, Roetzel & Andress, L.P.A., 1375 East Ninth Street, 9th Floor, One Cleveland Center, Cleveland, OH 44114; *Lawrence E. Sutter,* Sutter, O'Connell, 1301 East Ninth Street, Suite 1600, Cleveland, OH 44114; and *Joseph A. Farchione,* Wheeler Trigg O'Donnell LLP, 370 Seventeenth Street, Suite 4500, Denver, CO 80202 (For Defendants-Appellants).

COLLEEN MARY O'TOOLE, J.

{¶1} Dr. Tara Shipman, M.D., and Associates in Female Health, Inc., appeal from the judgment of the Trumbull County Court of Common Pleas, entered on a jury verdict, awarding Oakey Cobb, Jr., and his wife, Debra Cobb, $1,800,000, and their

minor daughter H.N.C., $12,102,000, for birth injuries sustained by H.N.C. Dr. Shipman and Associates in Female Health further appeal the trial court's denial of their motions for judgment notwithstanding the verdict and for a new trial. Essentially, they contend the trial in this case was full of prejudicial error, and deprived them of the fair trial guaranteed by the U.S. Constitution and the Ohio Constitution. We respectfully disagree, and affirm.

{¶2} In the summer of 1999, the Cobbs were expecting H.N.C., their first child. They had been trying to start a family for several years. Mrs. Cobb was 38. She was under the care of Dr. Hnat of Associates in Female Health. In July 1999, Dr. Shipman was hired by Associates in Female Health, having recently completed her residency at MetroHealth Medical Center in Cleveland, Ohio. Mrs. Cobb was one of her first patients. The pregnancy was uneventful, with a due date of December 26, 1999.

{¶3} Mrs. Cobb's due date came and passed. She visited with Dr. Shipman December 30, 1999. Dr. Shipman scheduled her for a routine non-stress test on January 3, 2000 at Trumbull Memorial Hospital. The test involves placing an electrical monitoring system on the mother's abdomen to check the baby's heart rate.

{¶4} During the test, an attending nurse observed drops in H.N.C.'s heart rate called decelerations. Finding these non-reassuring, she faxed the monitoring strips to Dr. Shipman, who ordered an oxytocin challenge test. This involves the intravenous injection of pitocin, a synthetic form of the hormone which induces contractions, and is designed to determine how well the baby would withstand labor. In this case, H.N.C. responded well, and the monitoring strips became reassuring. Dr. Shipman decided to

admit Mrs. Cobb for an induced labor. This involves increasing the doses of pitocin to encourage contractions.

{¶5} Initially, all went well. However, Dr. Martin Gubernick, M.D., one of the Cobbs' experts, testified that in the late hours of January 3, 2000, the fetal monitoring strips showed an increasing pattern of non-reassuring decelerations in H.N.C.'s heart beat. He testified that by the early morning of January 4, 2000, these decelerations were ominous, indicating fetal distress, and that H.N.C. was suffering from lack of oxygen. Dr. Gubernick testified the standard of care required Dr. Shipman to offer Mrs. Cobb an emergency caesarian section. Dr. Gubernick opined, to a reasonable degree of medical probability, that by 1:00 a.m., January 4, 2000, H.N.C. began to experience irreversible brain damage due to lack of oxygen. Nevertheless, no c-section was performed. Dr. Shipman remained at Mrs. Cobb's bedside from 1:15 a.m. until she delivered H.N.C. vaginally using a vacuum extractor at 3:48 a.m.

{¶6} At the time of delivery, H.N.C. was in severe distress. She was not breathing. She was ashen in color, with black feet. She was limp. Apgar numbers are used to score neonatal wellbeing. H.N.C. scored at the bottom of the range. Dr. Shipman signaled a Code Pink, calling a team to help H.N.C. There was an attempt to resuscitate H.N.C., including intubation. She was transported to Tod Children's Hospital, where she remained for several weeks. An ultrasound of her head on January 5, 2000 was interpreted as normal. A CT scan taken three days after her birth showed a cerebral edema – swelling of the brain. Cerebral edema appears in babies which have suffered brain damage due to lack of oxygen three to seven days after birth. The ultimate diagnosis for H.N.C. was that she suffered from hypoxic ischemic

encephalopathy. As a result she developed cerebral palsy, and is severely disabled. She cannot move without help, and has no essential use of her arms or legs. She cannot speak, and must be fed. Her physical condition will never improve.

{¶7} During the trial in this case, Dr. Salero, the anesthesiologist who resuscitated H.N.C., his employer, and the parent company of Trumbull Memorial Hospital settled with the Cobbs for $6,500,000. The settlement was approved by the Trumbull County Probate Court October 18, 2010, $2,400,000 being H.N.C.'s portion of the settlement, her parents receiving $4,100,000.

{¶8} Jury trial in this case commenced September 28, 2010. October 21, 2010, the jury returned a verdict of $12,102,000 in favor of H.N.C., and $1,800,000 for her parents, for a total award of $13,902,000. November 4, 2010, Dr. Shipman moved for judgment notwithstanding the verdict and/or a new trial. The Cobbs opposed. The trial court denied the motions December 7, 2010.

{¶9} November 17, 2010, Dr. Shipman moved for set-off regarding the settlements by former co-defendants, in the total $6,500,000 amount of that settlement. The Cobbs responded that Dr. Shipman was entitled to a set-off of $2,400,000 from the verdict in favor of H.N.C. and a set-off of $4,100,000 from the verdict in favor of her parents (thus totally satisfying their award in this case). The trial court agreed with the Cobbs, and found that H.N.C.'s award should be reduced to $9,702,000, and her parents award, be deemed satisfied.

{¶10} There was lengthy practice before the trial court regarding a motion for prejudgment interest filed by the Cobbs, and attendant discovery. This included appeals to this court, and the Supreme Court of Ohio, by Dr. Shipman. Related motion

practice was extensive. Dr. Shipman and Associates in Female Health eventually moved to dismiss the motion for prejudgment interest, relying on the decision in *Longbottom v. Mercy Hosp. Clermont*, 137 Ohio St.3d 103, 2013-Ohio-4068, which motion the trial court granted November 12, 2013.

{¶11} Dr. Shipman and Associates in Female Health timely noticed this appeal December 6, 2013, assigning 11 errors. The first reads: "The trial court committed prejudicial error in precluding Dr. Shipman from reading into evidence the deposition of pediatric neurology expert, Daniel Adler, M.D." Dr. Adler is a pediatric neurologist, originally retained by the Cobbs regarding their claims against anesthesiologist Dr. Salero, his employer, and Trumbull Memorial Hospital, regarding the effect of Dr. Salero failing to resuscitate H.N.C. properly. His deposition was taken in New York City August 10, 2010. Dr. Adler opined that H.N.C. only began to suffer from a slow heartbeat ("brachycardia"), and consequent loss of adequate oxygen, approximately five minutes before delivery, and that her irreversible brain damage only commenced about ten minutes after birth, due to a continuing lack of oxygen as a result of failure to resuscitate properly. The defense intended to read his discovery deposition into the record, to show that H.N.C.'s injuries arose from that failure, not any action or inaction of Dr. Shipman. The trial court denied the defense permission to read Dr. Adler's deposition into the record, finding he had not been qualified to testify as an expert.

{¶12} Dr. Shipman and Associates in Female Health contend this was error, for a series of reasons. First, they argue that their right to read the deposition into the record was absolute under Civ.R. 32(A). They contend the trial court excluded Dr. Adler's deposition due to a failure to qualify him as an expert pursuant to Evid.R.

601(D), which controls medical experts testifying to the standard of care. They note that Dr. Adler's testimony went to causation, not the standard of care, and that an expert in a medical malpractice case can testify regarding proximate cause without being qualified under Evid.R. 601(D). *Karpinski v. Lim*, 7th Dist. Columbiana No. 03 CO 64, 2004-Ohio-3037, ¶9. Finally, they argue they were prejudiced, since Dr. Adler's testimony would have required the trial court to give the jury an instruction on intervening superseding cause, which would have provided a complete defense.

{¶13} The Cobbs respond by noting they requested the deposition be excluded not for failure to qualify Dr. Adler under Evid.R. 601(D), but for failure to qualify him as a medical expert at all, under Evid.R. 702. They further note in his report and deposition, Dr. Adler did not exclusively attribute H.N.C.'s injuries to the failure to resuscitate properly, but also opined that her injuries commenced prior to birth – thus making an instruction on intervening superseding cause improper. Finally, they point out the trial court offered to allow the defense to call Dr. Adler as a witness, or retake his deposition, allowing a continuance to do so. Defense counsel declined these offers.

{¶14} Civ.R. 32(A) provides, in pertinent part:

{¶15} "At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:

{¶16} "* * *

{¶17} "* * *

{¶18} "(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: * * * (b) that the witness is beyond the subpoena power of the court in which the action is pending or resides outside of the county in which the action is pending unless it appears that the absence of the witness was procured by the party offering the deposition; * * * (e) that the witness is * * * [a] medical expert, * * *[.]"

{¶19} Thus, the rule states that depositions such as those of Dr. Adler "may" be used, not that they "shall be" admitted in to evidence. Dr. Shipman and Associates in Female Health were not entitled to use the deposition: the matter was within the sound discretion of the trial court, and is reviewed for abuse of discretion. *See, e.g.*, *Simpson v. Kuchipudi*, 3rd Dist. Allen No. 1-05-50, 2006-Ohio-5163, ¶8-10; *Lay v. Wilson*, 1st Dist. Hamilton No. C-950561, 1996 Ohio App. LEXIS 2202, *8 (May 29, 1996). Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶20} Dr. Shipman and Associates in Female Health are correct in the argument that a medical expert testifying to causation, not the standard of care, need not be qualified under Evid.R. 601(D). *Karpinski*, *supra*, at ¶9. However, we agree with the Cobbs that he does not seem to have been qualified as an expert at all. Evid.R. 702 provides, in pertinent part:

{¶21} "A witness may testify as an expert if all of the following apply:

{¶22} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶23} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶24} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information."

{¶25} As the Sixth Appellate District recently held:

{¶26} "More succinctly stated, for expert testimony to be admissible, Evid.R. 702(A) requires that the subject of the testimony be beyond the knowledge possessed by lay persons, (B) requires that the witness be qualified because of experience, education, and training, and (C) requires that the witness's testimony be reliable." *Theis v. Lane*, 6th Dist. Wood No. WD-12-047, 2013-Ohio-729, ¶10.

{¶27} In this case, Dr. Adler testified to his present practice, and that he works extensively as a medical expert. However, he did not testify regarding his education, his licensure(s), and the history of his practice. It is not evident from the parts of the record relied on by the parties whether the trial court excluded the deposition pursuant to Evid.R. 601(D) or Evid.R. 702, but we do not find it abused its discretion in excluding it under the latter rule.

{¶28} Further, we respectfully disagree that Dr. Adler's deposition testimony would have required the trial court to instruct the jury on intervening superseding cause. In *Berdyck v. Shinde*, 66 Ohio St.3d 573, 584-585 (1993), the court explained:

{¶29} "The intervention of a responsible human agency between a wrongful act and an injury does not absolve a defendant from liability if that defendant's prior negligence and the negligence of the intervening agency co-operated in proximately causing the injury. If the original negligence continues to the time of the injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate, concurring cause for which full liability may be imposed. 'Concurrent negligence consists of the negligence of two or more persons concurring, not necessarily in point of time, but in point of consequence, in producing a single indivisible injury.' *Garbe v. Halloran* (1948), 150 Ohio St. 476, * * *, paragraph one of the syllabus.

{¶30} "In order to relieve a party of liability, a break in the chain of causation must take place. A break will occur when there intervenes between an agency creating a hazard and an injury resulting therefrom another conscious and responsible agency which could or should have eliminated the hazard. *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 323, * * *, paragraph one of the syllabus; *Thrash v. U-Drive-It Co.* (1953), 158 Ohio St. 465, * * *, paragraph two of the syllabus. However, the intervening cause must be disconnected from the negligence of the first person and must be of itself an efficient, independent, and self-producing cause of the injury." (Parallel citations omitted.)

{¶31} Dr. Adler opined that H.N.C. was deprived of oxygen for about five minutes before delivery, and that her irreversible brain damage commenced some ten minutes after delivery. Quite simply, if a c-section had been performed earlier, no oxygen deprivation would have occurred. The failure to resuscitate H.N.C. in a timely fashion was not an "efficient, independent, and self-producing cause of the injury."

Berdyck at 585. The requirement for resuscitation was caused by the prior negligence. No instruction on intervening superseding cause was proper.

{¶32} Finally, even if the trial court erred by not allowing the reading of Dr. Adler's deposition, under these circumstances, we decline to find such error a basis for reversal. While not fully comprehended by the doctrine, this is very akin to invited error. "A party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make." *Lester v. Leuck*, 142 Ohio St. 91 (1943), paragraph one of the syllabus. In this case, the trial court gave the defense every opportunity to correct the error, if any, and it refused.

{¶33} Further, we must consider Civ.R. 61, governing harmless error. It provides:

{¶34} "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

{¶35} Since Dr. Shipman and Associates in Female Health would not have been entitled to an instruction on intervening superseding cause, even if Dr. Adler's deposition had been admitted, their substantial rights were not affected, even if the trial court's ruling was error.

{¶36} The first assignment of error lacks merit.

{¶37} The second assignment of error reads: "The trial court committed prejudicial error in failing to submit a narrative jury interrogatory requesting the jury to describe the manner in which it found Dr. Shipman to be negligent." Pursuant to Civ.R. 49(B), the defense requested an interrogatory to the jury, stating that, if the jury found Dr. Shipman to be negligent, to explain the basis for the finding. The interrogatory was followed by several blank lines for the jury's explanation. The trial court refused to give the interrogatory, instead offering to fashion a "checklist" interrogatory, with yes/no answers for particular questions. The defense refused this offer, and withdrew its request.

{¶38} On appeal, Dr. Shipman and Associates in Female Health point to the recent decision in *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656. In that medical malpractice case, defendant doctor requested an interrogatory substantially similar to that requested here. *Id.* at ¶76. The trial court denied the request, and the Ninth District affirmed this denial. *Id.* at ¶35, 76. The Supreme Court of Ohio reversed. *Id.* at ¶83. In doing so, it initially observed:

{¶39} "'The purpose of an interrogatory is to "test the jury's thinking in resolving an ultimate issue so as not to conflict with its verdict."' *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St.3d 611, 613, * * * (1994). When both the content and the form of a proposed interrogatory are proper, Civ.R. 49 imposes a mandatory duty upon the trial court to submit the interrogatory to the jury. *See id*. A proper interrogatory is designed to lead to '"findings of such a character as will test the correctness of the general verdict returned and enable the court to determine as a matter of law whether such verdict shall stand."' *Id.* at 613-614, quoting *Bradley v. Mansfield Rapid Transit, Inc.*, * * * (1950).

Accordingly, '(w)hen the plaintiff's allegations include more than one act of negligence, it is proper to instruct the jury to specify of what the negligence consisted.' *Freeman* at 614, citing *Davison v. Flowers*, 123 Ohio St. 89, * * * (1930), at paragraph four of the syllabus. We have repeatedly approved interrogatories requesting the jury to state '"in what respects the defendant was negligent."' *Freeman* at 614, quoting *Ragone v. Vitali & Beltrami, Jr., Inc.*, 42 Ohio St.2d 161, * * * (1975), at paragraph two of the syllabus." (Parallel citations omitted.) *Moretz* at ¶77.

{¶40} The Supreme Court then determined the trial court had erred in finding no interrogatory was required because there was only one real allegation of negligence – i.e., that Dr. Muakkassa failed to scrub in for surgery. *Id.* at ¶78. Rather, it found there were four separate allegations of negligence, thus mandating the giving of the interrogatory requested. *Id.* at ¶79-83.

{¶41} Consequently, in this case, the trial court committed reversible error by failing to give the exact interrogatory requested by the defense – *if* there were multiple allegations of negligence.[1] Dr. Shipman and Associates in Female Health assert five allegations of negligence were made against her: (1) that Mrs. Cobb should have delivered at a tertiary care center, due to her age, etc.; (2) that Dr. Shipman should have offered the choice between an induced labor and a c-section initially; (3) that Dr. Shipman should have remained at the hospital throughout the procedure (she returned to her office at one point); (4) that a c-section should have been performed starting at 9:00 p.m., January 3, 2000, when the first patterns of deceleration in H.N.C.'s heartbeat

1. On appeal, the Cobbs, citing to the decision in *Deskins v. Cunningham*, 3rd Dist. Union No. 14-05-29, 2006-Ohio-2003, contend appellants waived any error relating to the interrogatory by failing to file it with the court. *Id.* at ¶50. We respectfully find *Deskins* distinguishable. In that case, appellants did not place on the record, in any fashion, the interrogatory requested. *Id.* In this case, the trial court itself placed the substance of the interrogatory on the record in chambers. Thus, we are able to review it.

were noticed; and (5) that a c-section should have been performed immediately upon Dr. Shipman's return to the hospital.

{¶42} Reviewing the record, we are compelled to disagree with this recitation of the alleged acts of negligence. The learned trial court stated as follows:

{¶43} "I would note for the record that I believe the issues in this case for a medical malpractice case are really rather simple, and by that I mean the real issue for the jury is whether or not Dr. Shipman should have ordered a Cesarean section at the appropriate time. And for that reason, I don't believe a narrative is warranted to reasonably test the verdict in this scenario."

{¶44} We agree with the trial court. The testimony of the Cobbs' expert, Dr. Gubernick, was that it would have been preferable to offer a c-section initially, along with induced labor, but that failure to do so was not a breach of the standard of care. He testified that it became increasingly evident, from about 9:00 p.m., January 3, 2000, that H.N.C. was in distress, and that a c-section was required; that H.N.C. began to suffer brain damage from 1:00 a.m., January 4, 2000, thus further necessitating a c-section, with increasing urgency, right to the moment of her birth at 3:48 a.m. We respectfully conclude the failure to perform a c-section is the sole negligence alleged in this case, and no narrative interrogatory was required.

{¶45} The second assignment of error lacks merit.

{¶46} The third assignment of error reads: "The trial court erred in not granting a new trial due to juror misconduct during voir dire." In voir dire, the trial court asked each juror whether they had been involved in the litigation process. Dr. Shipman and

Associates in Female Health assert that four jurors (and one alternate) failed to disclose significant participation in litigation.

{¶47} Juror Fritz did not disclose the trial court had once granted summary judgment to the defendant in a bar fight case in which he was involved; that his home was foreclosed on just prior to trial; and that he had filed multiple bankruptcies.

{¶48} Juror Long failed to disclose several foreclosure actions against him, and various actions for money owed against him in the local municipal courts.

{¶49} Juror Stachowiak failed to disclose a foreclosure; a bankruptcy; and a criminal indictment in Cuyahoga County which was dismissed.

{¶50} Juror Bidinotto failed to disclose a foreclosure against her.

{¶51} Alternate juror Washington failed to disclose she had been sued by one of the settling co-defendants for money owed.

{¶52} The lead case on the subject of whether failure to disclose information by a juror in voir dire justifies a new trial is *Grundy v. Dhillon*, 120 Ohio St.3d 415, 2008-Ohio-6324, an appeal from this court. The Supreme Court held, at paragraphs one and two of the syllabus:

{¶53} "1. To obtain a new trial in a case in which a juror has not disclosed information during voir dire, the moving party must first demonstrate that a juror failed to answer honestly a material question on voir dire and that the moving party was prejudiced by the presence on the trial jury of a juror who failed to disclose material information. To demonstrate prejudice, the moving party must show that an accurate response from the juror would have provided a valid basis for a for-cause challenge. (*Pearson v. Gardner Cartage Co., Inc.* (1947), 148 Ohio St. 425, * * *, paragraph two of

the syllabus, and *McDonough Power Equip., Inc. v. Greenwood* (1984), 464 U.S. 548, * * *, followed.)

{¶54} "2. In determining whether a juror failed to answer honestly a material question on voir dire and whether that nondisclosure provided a basis for a for-cause challenge, an appellate court may not substitute its judgment for the trial court's judgment unless it appears that the trial court's attitude was unreasonable, arbitrary, or unconscionable. (*Pearson v. Gardner Cartage Co., Inc.* (1947), 148 Ohio St. 425, * * *, paragraph two of the syllabus, followed.)" (Parallel citations omitted.)

{¶55} R.C. 2313.17 governs for-cause challenges, and provides, in pertinent part:

{¶56} "(B) The following are good causes for challenge to any person called as a juror:

{¶57} "(1) That the person has been convicted of a crime that by law renders the person disqualified to serve on a jury;

{¶58} "(2) That the person has an interest in the cause;

{¶59} "(3) That the person has an action pending between the person and either party;

{¶60} "(4) That the person formerly was a juror in the same cause;

{¶61} "(5) That the person is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;

{¶62} "(6) That the person is subpoenaed in good faith as a witness in the cause;

{¶63} "(7) That the person is akin by consanguinity or affinity within the fourth degree to either party or to the attorney of either party;

{¶64} "(8) That the person or the person's spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against any such party to another such action;

{¶65} "(9) That the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court.

{¶66} "* * *

{¶67} "(D) In addition to the causes listed in division (B) of this section, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, * * *, or other cause that may render the juror at the time an unsuitable juror. The validity of the challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased."

{¶68} The gravamen of the argument advanced by Dr. Shipman and Associates in Female Health is that Jurors Fritz, Long, Stachowiak, and Bidinotto had all been involved in financial trouble ending in court cases, and they would, therefore, be sympathetic to the financial burdens imposed on the Cobb family due to H.N.C.'s disability. Thus, appellants seem to believe that R.C. 2313.17(D) would support for-cause challenges to these jurors, if only they had disclosed the relevant information.

{¶69} We review this assignment of error for abuse of discretion. *Grundy*, *supra*, at paragraph two of the syllabus. In denying the motion for new trial on this basis, the trial court observed that most people viewed "litigation" as trial, not such procedures as

foreclosure and bankruptcy. It further pointed out that each of the jurors mentioned had affirmed they could be fair and impartial, and that *Grundy* dictates that such a response "cut(s) against any basis for a for-cause challenge." *Id.* at ¶52. The Cobbs also note that defense counsel could have questioned the jurors about their litigation background, but left this to the trial court.

{¶70} Under *Grundy*, the moving party must affirmatively establish prejudice through failure by a juror to disclose. *Id.* at paragraph one of the syllabus. Like the learned trial court, we do not find such a showing has been made.

{¶71} The third assignment of error lacks merit.

{¶72} The fourth assignment of error reads: "The trial court committed prejudicial error in allowing plaintiffs' counsel to make inflammatory remarks and arguments during the course of trial that were clearly intended to arouse sympathy and influence the jury." Dr. Shipman and Associates in Female Health recount a litany of allegedly improper statements, arguments and questions made by the Cobbs' attorneys, some in opening, some during trial, and some in closing, and assert these rendered the trial unfair.

{¶73} We respectfully disagree. Certainly the Cobbs' counsel used colorful, and even pungent, language in opening and closing. However, counsel is allowed great latitude in opening and closing. *State v. Byrd*, 32 Ohio St.3d 79, 82 (1987). Further, this was a three week trial. The alleged instances of improper questions or arguments during the course of such a lengthy trial are insufficient to establish that attorney misconduct prevented Dr. Shipman and Associates in Female Health from obtaining a fair trial, which is the standard they must meet. *Vescuso v. Lauria*, 63 Ohio App.3d 336, 340-341 (8th Dist.1989).

{¶74} The fourth assignment of error lacks merit.

{¶75} The fifth assignment of error reads: "The trial court committed prejudicial error in precluding Dr. Shipman from cross-examining plaintiffs' expert, Martin Gubernick, M.D., about his disqualification to testify as an expert in another medical malpractice action." Dr. Shipman and Associates in Female Health wished to cross examine Dr. Gubernick regarding his testimony in *Hitch v. Thomas*, 6th Dist. Lucas No. L-09-1292, 2010-Ohio-3630. Following an in camera hearing, the trial court would not allow it.

{¶76} We review a trial court's evidentiary rulings for abuse of discretion. *Musson v. Musson*, 11th Dist. Trumbull No. 2013-T-0113, 2014-Ohio-5381, ¶34.

{¶77} *Hitch*, *supra*, also involved birth injuries. *Id.* at ¶7. Dr. Gubernick was retained by plaintiff as an expert in standard of care and causation. *Id.* at ¶11, 13. On summary judgment proceedings, the trial court excluded his opinions as speculative, due, essentially, to a lack of factual foundation. *Id.* at ¶35-39. The Sixth District agreed. *Id.* at ¶41.

{¶78} Dr. Shipman and Associates in Female Health cite to the decision in *Cleveland v. St. Elizabeth Health Ctr.*, 7th Dist. Mahoning No. 10-MA-151, 2012-Ohio-1472 for the proposition that Dr. Gubernick, having put his credentials at issue by testifying as the Cobbs' expert, was subject to cross-examination regarding those credentials using the decision in *Hitch*. We respectfully find *Cleveland* distinguishable. In that case, a doctor, testifying as an expert on his own behalf, had experienced license suspensions in two states, about which the trial court did not allow cross examination. *Id.* at ¶49. The Seventh District found this to be error, since the law

establishes that the suspension of a physician's license goes to the physician's credibility as a witness in medical matters. *Id.* at ¶50-54. *Hitch* had nothing to do with Dr. Gubernick's qualifications as an expert, nor his credibility: it involved the failure to lay a proper foundation for his expert opinions. Consequently, we cannot find the trial court abused its discretion in not allowing Dr. Gubernick to be cross examined on the basis of *Hitch*.

{¶79} The fifth assignment of error lacks merit.

{¶80} The sixth assignment of error reads: "The trial court committed prejudicial error in allowing plaintiffs to play the videotaped discovery deposition of settled co-defendants' psychology expert, Karen O'Donnell, PhD." Dr. O'Donnell was retained by one of the settling co-defendants to conduct psychological testing of H.N.C. and her parents. Dr. Shipman and Associates in Female Health contend they were unaware her videotaped deposition would be used in trial against them. They further contend this court has held that the testimony of an expert retained by a party settling on the eve of trial cannot be used by a party remaining in the case, citing to *Gaves v. Cabi*, 11th Dist. Trumbull Nos. 96-T-5506, 96-T-5537, and 97-T-0026, 1997 Ohio App. LEXIS 5570 (Dec. 12, 1997).

{¶81} The decision of a trial court to admit expert testimony is reviewed for abuse of discretion. *State v. Bracone*, 5th Dist. Tuscarawas No. 2013 AP 11 0046, 2014-Ohio-4058, ¶84.

{¶82} We respectfully note that Dr. O'Donnell was the first witness set forth on the Cobbs' witness list. She was listed as being there on cross examination, at a time the co-defendants had not yet settled, so there might be some surprise in the use of her

deposition after that settlement. However, the trial court offered to allow Dr. Shipman and Associates in Female Health to further depose Dr. O'Donnell, or to call her as a live witness, which offer was declined. Consequently, we cannot conclude that appellants were prejudiced by the use of the videotaped deposition at trial.

{¶83} Further, we respectfully agree with the Cobbs that the decision in *Gaves* does not stand for the proposition advanced by appellants. In *Ochletree v. Trumbull Mem. Hosp.*, 11th Dist. Trumbull No. 2005-T-0015, 2006-Ohio-1006, ¶47-48, this court stated:

{¶84} "Appellant's reliance on *Gaves v. Cabi* (Dec. 12, 1997), 11th Dist. Nos. 96-T-5506, 96-T-5537, and 97-T-0026, 1997 Ohio App. LEXIS 5570, for the proposition that videotaped deposition testimony by a settled party is inadmissible is misplaced. In *Gaves*, this court determined that based on the facts in that case, the trial court did not abuse its discretion by excluding videotaped deposition testimony of the appellant's expert who was no longer a party to the action. 1997 Ohio App. LEXIS 5570, at *8. We held that the exclusion of evidence rested within the sound discretion of the trial court and would not be disturbed on appeal absent an abuse of discretion. 1997 Ohio App. LEXIS 5570, at *7.

{¶85} "Here, we note that the nurses' negligence was discussed by appellant's own expert witnesses. Also, appellant had notice before trial that appellees intended to use Dr. Furlan's videotaped deposition. Whether or not defendant TMH settled and was dismissed from the suit does not negate the fact that appellant was on notice. *Hunt v. Crossroads Psych. & Psychological Ctr.* (Dec. 6, 2001), 8th Dist. No. 79120, 2001 Ohio

App. LEXIS 5388, at *13. The trial court did not abuse its discretion by admitting the videotaped deposition testimony."

{¶86} Similarly, in this case, Dr. Shipman and Associates in Female Health had notice the deposition might be used. The trial court did not abuse its discretion in admitting it.

{¶87} The sixth assignment of error lacks merit.

{¶88} The seventh assignment of error reads: "The trial court committed prejudicial error in allowing plaintiffs to cross-examine Dr. Shipman's expert, Elias Chalhub, M.D., regarding his liability insurance coverage." The trial court allowed the Cobbs' counsel to cross examine Dr. Chalhub on the fact that he and Dr. Shipman have the same malpractice insurer, without first establishing whether Dr. Chalhub was aware of this (he was not).

{¶89} "In a medical malpractice action, evidence of a commonality of insurance interests between a defendant and an expert witness is sufficiently probative of the expert's bias as to clearly outweigh any potential prejudice evidence of insurance might cause. (Evid.R. 411, applied.)" *Ede v. Atrium S. OB-GYN, Inc.*, 71 Ohio St.3d 124 (1994), syllabus.

{¶90} Essentially, Dr. Shipman and Associates in Female Health seem to contend that Dr. Chalhub's ignorance of the fact he and Dr. Shipman had the same insurer requires us to distinguish *Ede*. In opposition, the Cobbs refer us to the decision in *Cummins v. Kettering Med. Ctr.*, 2d Dist. Montgomery No. 22170, 2008-Ohio-2591. In that case, the trial court did not allow the jury to see the portion of a medical expert's videotaped deposition in which he was cross examined regarding his commonality of

insurance with defendant doctor. *Id.* at ¶36. The doctor being questioned, Russell Vester, M.D., had not known of the commonality of insurance until shortly before the deposition. *Id.* In relevant part, the Second District held:

{¶91} "We are more sympathetic to the appellees' argument that Dr. Vester did not discover a commonality of insurance between himself and Dr. Pavlina until two weeks before his perpetuation deposition. The appellees logically reason that a commonality of insurance between Dr. Vester and Dr. Pavlina could not have biased Dr. Vester's medical opinions if he was unaware of the common insurance when he formed his opinions. Therefore, they argue that the trial court could not have committed prejudicial error in disallowing cross examination about the commonality of insurance between Dr. Vester and Dr. Pavlina.

{¶92} "Although the foregoing argument is reasonable, it is foreclosed by the Ohio Supreme Court's ruling in *Davis* [*v. Immediate Med. Serv., Inc.*, 80 Ohio St.3d 10 (1997)]. In that case, one of the physician defendants, Dr. Barbara Guarnieri, presented expert testimony from Dr. Bruce Janiak. Dr. Guarnieri and Dr. Janiak were not insured by the same company. But Dr. Janiak and another defendant in the case did share a common malpractice insurer. Relying on *Ede,* the *Davis* majority held that the trial court abused its discretion in not allowing cross examination on the issue of commonality of insurance. According to the majority, the jury should have been permitted to hear the testimony because it raised a potential issue of bias that was for the trier of fact to resolve. *Davis*, 80 Ohio St.3d at 15-17. The majority reached this conclusion despite a dissent stressing Dr. Janiak's voir dire testimony 'that he was unaware that his premiums might be affected by this case *since he testified that he was also unaware of*

other defendants being insured by his insurer.' *Id. at 25* (Lundberg Stratton, J., dissenting) (emphasis added). In light of *Davis,* we are compelled to reject the appellees' argument that a commonality of insurance between Dr. Vester and Dr. Pavlina could not have biased Dr. Vester's medical opinions because he contends he was unaware of the common insurance when he formed his opinions. The *Davis* majority necessarily must have concluded that the credibility of such a contention is a jury question." (Emphasis sic.) *Cummins* at ¶39-40.

{¶93} Based on *Davis* and *Cummins*, we are constrained to reject appellants' invitation to distinguish *Ede*.

{¶94} The seventh assignment of error lacks merit.

{¶95} The eighth assignment of error reads: "The trial court erred in its charge to the jury." Dr. Shipman and Associates in Female Health contend the trial court erred in three jury instructions it gave, and also erred by failing to give an instruction.

{¶96} "A jury instruction is proper if it correctly states the law and if it applies in light of the evidence adduced in the case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591, * * * (1991). The precise language of a jury instruction, however, is within the discretion of the trial court. *Youssef v. Parr, Inc.,* 69 Ohio App.3d 679, 690, * * * (8th Dist.1990), citing *State v. Scott*, 41 Ohio App.3d 313, * * * (8th Dist.1987). Therefore, when reviewing a trial court's jury instructions, the proper standard of review for an appellate court is abuse of discretion. *Harris v. Noveon, Inc.*, 8th Dist. Cuyahoga No. 93122, 2010-Ohio-674, ¶ 20, citing *Chambers v. Admr., Ohio Bur. of Workers' Comp.*, 164 Ohio App. 3d 397, 2005-Ohio-6086, * * * (9th Dist)." (Parallel citations omitted.) *McQueen v. Greulich*, 8th Dist. Cuyahoga No. 100544, 2014-Ohio-3714, ¶19.

{¶97} First, appellants object to the fact the trial court used the phrase "clinical judgment" in its charge to the jury on a physician's standard of care. The trial court stated: "'Moreover, a physician can exercise his or her best clinical judgment and still fall below the standard of care.'" Appellants principally rely on the decision in *Kurzner v. Sanders*, 89 Ohio App.3d 674 (1st Dist.1993). In that case, the First District held the following jury instruction in a medical malpractice case was error:

{¶98} "'An error in judgment alone would not constitute negligence as long as (the doctor) exerted a reasonable standard of care and prudence as an ophthalmologist in a reasonable management of plaintiff Dennis Kurzner's condition. He is not liable for what is commonly called an honest error or mistake in judgment unless there is negligence or a departure from the standard of care.'" *Id.* at 678.

{¶99} Fundamentally, the *Kurzner* court believed the trial court's instruction, which the court characterized as substituting the concept of "clinical judgment" for standard of care, improperly substituted a subjective standard of care for an objective one. *Id.* at 678-680.

{¶100} We respectfully find this reliance on *Kurzner* misplaced. As the Cobbs point out, the Comment to O.J.I. CV 417.01, concerning the standard of care for physicians, specifically cites to *Kurzner* for the proposition that "A doctor can be exercising his/her best clinical judgment and still be negligent." This is derived from the following language in *Kurzner*: "A doctor can indeed be exercising his best clinical judgment and still be negligent." *Id.* at 680.

{¶101} The standard of care instruction given by the trial court in this case is clearly derived from the standard instruction at O.J.I. CV 417.01. It does not change the standard of care from objective to subjective.

{¶102} This issue lacks merit.

{¶103} Dr. Shipman and Associates in Female Health also find error in what they term an "eggshell instruction" given by the court – i.e., it is no defense to negligence that an injured party is more susceptible to injury than others. They contend such an instruction only applies to the issue of damages, and that the trial court, in this case, gave it in response to appellants' proximate cause and standard of care defenses.

{¶104} We respectfully agree with the Cobbs that the trial court did not err in giving this instruction. As they note, testimony was given by two of the world's leading placental pathologists, Dr. Enid Gilbert-Barnes and Dr. Raymond Redline, that Mrs. Cobb's placenta was "underperfused," and that this condition made H.N.C. more susceptible to injury in a high-stress birth.

{¶105} This issue lacks merit.

{¶106} Third, Dr. Shipman and Associates in Female Health contend the trial court gave an instruction that it would reduce the verdict in order to account for the settlement with co-defendants. Again, we agree with the Cobbs the trial court said no such thing. Rather, it informed the jury not to speculate on the settlement; to fully value the claim at issue; and that it (the trial court) would make any adjustment thereafter, if necessary. This was a sufficiently correct statement of the law. *See., e.g.*, *Celmer v. Rodgers*, 11th Dist. Trumbull No. 2004-T-0083, 2005-Ohio-7055, ¶21.

{¶107} This issue lacks merit.

{¶108} Finally, Dr. Shipman and Associates in Female Health contend the trial court should have instructed the jury on intervening superseding cause. They argue that if the deposition of Dr. Adler had been read into the record, it would have shown that H.N.C.'s injuries arose from the botched resuscitation efforts, not any negligence by Dr. Shipman.

{¶109} As we have already concluded the trial court did not err in keeping Dr. Adler's deposition out of the record, we conclude this issue lacks merit.

{¶110} The eighth assignment of error lacks merit.

{¶111} The ninth assignment of error reads: "The trial court erred in denying Dr. Shipman's motion for judgment notwithstanding the verdict." The tenth assignment of error reads: "The trial court erred in denying Dr. Shipman's motion for new trial." Being interrelated, we treat these assignments together.

{¶112} In *Arndt v. P & M LTD*, 11th Dist. Portage No. 2013-P-0027, 2014-Ohio-3076, ¶141-143, we stated:

{¶113} "'(N)ot later than twenty-eight days after entry of judgment (following a jury trial), a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion; or if a verdict was not returned such party, within twenty-eight days after the jury has been discharged, may move for judgment in accordance with the party's motion.' Civ.R. 50(B); *Freeman v. Wilkinson*, 65 Ohio St.3d 307, 309, * * * (1992) (Civ.R. 50(B) 'only applies in cases tried by jury').

{¶114} "'A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.' Civ.R. 50(B). 'A new trial may be granted to all or any

of the parties and on all or part of the issues,' where '(t)he judgment is not sustained by the weight of the evidence.' Civ.R 59(A)(6).

{¶115} 'When considering a motion for judgment notwithstanding the verdict, '(t)he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied.' *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275, * * * (1976). 'In considering a motion for judgment notwithstanding the verdict, a court does not weigh the evidence or test the credibility of the witnesses.' *Osler v. Lorain*, 28 Ohio St.3d 345, * * * (1986), syllabus; *Posin* at 275 ('(n)either the weight of the evidence nor the credibility of the witnesses is for the court's determination'). Thus, the question is whether there is sufficient evidence regarding a particular issue for the trial court to submit the issue to the jury for determination. *O'Day v. Webb*, 29 Ohio St.2d 215, * * * (1972), paragraph four of the syllabus. As a question of law, the standard of appellate review is de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, * * *, ¶ 4.' (Parallel citations omitted.)

{¶116} Regarding motions for new trial, we recently stated, in *Patterson v. Godale*, 11th Dist. Lake Nos. 2014-L-034 and 2014-L-042, 2014-Ohio-5615, ¶30-37:

{¶117} "The decision to grant or deny a motion for a new trial is reviewed for abuse of discretion. *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-5855, ¶69, * * * (11th Dist.) * * *[.]

{¶118} "In *McWreath*, *supra*, at ¶70-75, this court observed:

{¶119} "'As the Supreme Court of Ohio explained in *Rohde* [*v. Farmer*, 23 Ohio St.2d 82, * * *(1970)]:

{¶120} "'"(W)here the appeal is from the granting of a motion for new trial, and the trial court's decision on the motion for new trial involves questions of fact, it has been held that the appellate court should view the evidence favorably to the trial court's action rather than to the original jury's verdict. 5 American Jurisprudence 2d 326, Section 887.

{¶121} "'"This rule of appellate review is predicated, in part, upon the principle that the discretion of the trial judge in granting a new trial on the weight of the evidence may be supported by his having seen and heard the witnesses and having formed a doubt as to their credibility, or having determined from the surrounding circumstances and atmosphere of the trial, that the jury's verdict resulted in manifest injustice." *Id.* at 94.'

{¶122} "'This court has similarly recognized that the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial. *Kitchen v. Wickliffe Country Place* (July 13, 2001), 11th Dist. No. 2000-L-051, 2001 Ohio App. LEXIS 3191, at *8.

{¶123} "'Furthermore, as the Supreme Court of Ohio stated recently, in *Harris v. Mt. Sinai Med. Ctr.* (2007), 116 Ohio St. 3d 139, 147, 2007-Ohio-5587, * * *:

{¶124} "'"Where in the exercise of discretion a trial court decides to grant a new trial and that decision is supported by competent, credible evidence, a reviewing court must defer to the trial court. In such a case, the reviewing court may not independently assess whether the verdict was supported by the evidence, because the issue is not whether the verdict in supported by competent, credible evidence, but rather whether

the court's decision to grant the new trial is supported by competent, credible evidence."""

{¶125} In support of these assignments of error, Dr. Shipman and Associates in Female Health argue the record contains no competent evidence that Dr. Shipman was negligent, and that the jury's verdict was the result of passion and prejudice. We disagree there is no evidence of negligence on Dr. Shipman's part: there was plentiful testimony that she did breach the standard of care. And we have already rejected the argument that the verdict was founded on passion and prejudice.

{¶126} The ninth and tenth assignments of error lack merit.

{¶127} The eleventh assignment of error reads: "The trial court erred in failing to properly apply the set-off for co-defendants' settlements with plaintiffs." The co-defendants settled for $6,500,000. The settlement was approved by the probate court during the trial, with $2,400,000 being H.N.C.'s portion, and $4,100,000 being assigned her parents. The jury returned a verdict of $13,902,000 against Dr. Shipman and Associates in Female Health, $12,102,000 being H.N.C.'s portion, and $1,800,000 being assigned her parents. Dr. Shipman and Associates in Female Health moved for setoff under former R.C. 2307.32, of the entire $6,500,000 settlement. The trial court, instead, reduced H.N.C.'s jury award by the $2,400,000 she received in the settlement, and her parent's award by the $4,100,000 they received in the settlement (thus deeming their jury award satisfied). Appellants argue this was error, and that the entire settlement had to be set-off against the entire jury award.

{¶128} We find the trial court's reasoning on this issue persuasive. As it observed, "The language of R.C. §2307.32 speaks to the Plaintiffs' claim(s), not to the

tortfeasor's exposure." The trial court then cited to *Grindell v. Huber*, 28 Ohio St.2d 71 (1971), paragraph one of the syllabus, which states:

{¶129} "Where a minor child sustains an injury allegedly as the result of negligence of a defendant, two separate and distinct causes of action arise: an action by the minor child for his personal injuries and a derivative action in favor of the parents of the child for the loss of his services and his medical expenses. (Paragraph three of the syllabus of *Whitehead v. Genl. Tel. Co.*, 20 Ohio St.2d 108, approved and followed.)"

{¶130} Thus, the trial court correctly found that H.N.C. and her parents had separate claims, and correctly applied their separate portions of the settlement to their separate jury awards.

{¶131} The eleventh assignment of error lacks merit.

{¶132} The judgment of the Trumbull County Court of Common Pleas is affirmed. All pending motions are hereby overruled.

DIANE V. GRENDELL, J.,

SEAN C. GALLAGHER, J., Eighth Appellate District, sitting by assignment,

concur.